Filed 11/4/15 P. v. Garcia CA5

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

THE PEOPLE,

Plaintiff and Respondent,

v.

ALBERT MICHAEL GARCIA,

Defendant and Appellant.

F069234

(Super. Ct. Nos. BF150059A & BF151270A)

OPINION

APPEAL from a judgment of the Superior Court of Kern County. Gary T. Friedman, Judge.

Anne V. Moore, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Michael P. Farrell, Assistant Attorney General, Carlos A. Martinez and Wanda Hill Rouzan, Deputy Attorneys General, for Plaintiff and Respondent.

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A jury found defendant Albert Michael Garcia guilty of felony reckless evasion of a peace officer (Veh. Code, § 2800.2, subd. (a)) and misdemeanor driving with a suspended or revoked license (Veh. Code, § 14601.1, subd. (a)). In this appeal, Garcia contends the trial court abused its discretion by allowing his prior felony convictions and prior misdemeanor conduct to be used for impeachment purposes. He further argues the prosecutor engaged in prejudicial misconduct and his trial attorney provided ineffective assistance by failing to object to the prosecutor's misconduct.

We affirm the judgment.

FACTS AND PROCEDURAL HISTORY

Garcia was charged with operating a motor vehicle while fleeing from a pursuing peace officer's motor vehicle (Veh. Code, § 2800.2; count 1) and driving at a time when his driving privilege was suspended or revoked (Veh. Code, § 14601.1, subd. (a); count 2). It was further alleged that Garcia had two prior prison terms. (Pen. Code, § 667.5, subd. (b).)[1]

Motions in limine

In their trial brief, the People moved in limine to allow admission of three prior felony convictions for impeachment purposes if Garcia chose to testify. These were convictions for (1) second degree burglary (§ 460, subd. (b)) in 2001, (2) receipt of a stolen vehicle (§ 496d) in 2005, and (3) possession of firearm by a felon (former § 12021, subd. (a)(1)) in 2011. The People also sought leave of the court to impeach Garcia with the conduct reflected by his misdemeanor conviction for false representation of identity to a peace officer (§ 148.9, subd. (a)) in Tulare County in 2007.

The same day the People filed their trial brief, Garcia filed a motion in limine to exclude any evidence of, and reference to, his prior arrests and convictions even if he were to testify. He objected on the ground that such evidence constituted improper

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1 All further statutory references are to the Penal Code unless otherwise noted.

character evidence under Evidence Code section 1101, subdivision (a). He also argued that any probative value of evidence of misdemeanor conduct was outweighed by the probability of undue prejudice, citing Evidence Code section 352. Garcia asked, in the alternative, that the trial court limit the People to using a single felony conviction to impeach.

In a pretrial discussion, the trial court tentatively ruled that evidence of the three convictions and questioning on the misdemeanor conduct would be allowed for impeachment purposes, and also noted Garcia had the right to request the convictions be sanitized. The court explained that the three felony convictions involved crimes of moral turpitude, were not remote in time, were dissimilar from the crimes charged in the current case, and showed "aberrant behavior over a period of time."

Responding to Garcia's suggestion that only the most recent felony from 2011 be admitted for impeachment purposes, the prosecutor argued that no witness "should be able to testify under a false aura of credibility, and this defendant does have these three felonies …." The court concurred, stating "Can't testify with a halo if it's not justified, correct?" Garcia requested that the conviction for receipt of a stolen vehicle be referred to as receipt of stolen property, and the court agreed. Garcia again argued that reference to the conduct of false representation to a peace officer would be unduly prejudicial, but the court rejected this argument, finding the conduct particularly relevant to credibility.

Prosecution's case

Around 1:00 a.m. on October 12, 2013, Bakersfield City police officer Lerry Esparza observed a black Crown Victoria travel northbound on Cottonwood Road and then fail to stop or slow down at a red light as it turned east onto East Brundage Lane. The car accelerated quickly and entered Highway 58 westbound. Esparza and his partner Edgar Aguilera followed the car and attempted to initiate a traffic stop by turning on the siren and the overhead red and blue lights. The officers were in a marked patrol car and were dressed in police uniforms; Aguilera drove.

The car did not pull over, and the officers followed the car, which "was still pulling away from [them]" as their patrol car reached 100 miles per hour. The car moved between lanes, "weaving in and out of traffic [and] failing to signal." At one point, the car almost struck a semi-trailer truck as it changed lanes. The car went over to the far left dirt shoulder and fishtailed; debris shot out from the back of the car and hit the pursuing patrol car. The car approached the end of the freeway, and Esparza noticed that no brake lights came on as the car exited the freeway and turned right (northbound) onto South Real Road.

Responding to the area to assist in the pursuit, officers in two patrol cars drove southbound on South Real Road toward Highway 58. After turning right onto South Real Road at about 60 miles per hour, the black Crown Victoria hit a raised median and came to a stop with the two patrol cars of the assisting officers directly in front of it. Esparza testified that the car "became disabled" and "wouldn't turn on." The officers drew their guns,[2] and Garcia was pulled out from the driver's side of the car. He was arrested "without further incident," according to Esparza. When Esparza first saw Garcia's face before he was pulled out of his car, Garcia had a cut on his face. Esparza was shown a photograph of Garcia taken after he was arrested, and he said that was how Garcia looked when he was still in his car.

During the pursuit, Esparza radioed to dispatch, and a recording of relevant dispatch radio traffic was played for the jury. According to a transcript of the recording, Esparza reported, "… still continuing westbound. Speeds are at a hundred, no traffic, no pedestrians." At trial, Esparza testified that "no traffic" means there is no heavy traffic, but does not necessarily mean "nobody [is] on the roadway, just not heavy traffic."[3] The

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[2] This was a high-risk felony stop, which Esparza described as "whenever we deem that the person we are pulling over is that much of a threat, not only to us, but to public, and they are pulled out of the vehicle at gunpoint."

[3] Esparza further explained: "We say 'no traffic' so that my boss can allow the pursuit to continue. If he feels that there's too much traffic and [a pursuit] poses a risk to people on the

night of the pursuit, there were "a few cars on the roadway, enough for [Garcia] to drive in and out of traffic without causing an accident."

Defense

Garcia testified on his own behalf. The night he was arrested, Garcia was driving from a friend's house, near Cottonwood Road, to his aunt's house in the Oleander area of central Bakersfield. He drove northbound on Cottonwood and turned east onto East Brundage to enter the freeway. He testified that the traffic light at the intersection of Cottonwood and East Brundage was red and he stopped and signaled before turning right. He saw police officers driving southbound on Cottonwood. He did not see any police lights, but he was aware of the officers. He testified, "I knew he was there, so I wasn't about to run a red light, especially at one o'clock in the morning" "[bec]ause I didn't have a driver's license."

According to Garcia, he never saw a police car with lights on and he would have stopped had he seen lights. He did not hear a siren either. Garcia said his stereo was loud and estimated he "was probably doing 80 [miles per hour], at best, with [the] stereo up." He said no one else was on the freeway, he did not swerve from lane to lane, and he thought he was driving safely. He did not look behind him because there was no traffic at all on Highway 58 while he was driving.

Garcia continued, "When I came to [Highway] 58 and [South] Real [Road], there was a bunch of cops on the other side of the road, and then I just pulled in and stopped right there." Officers pulled their guns and told him to get on his stomach and then crawl backward toward them. Garcia testified, "[T]hen they arrested me and they—well, he kneed me in the back of the head, scraped my face, and then he—they broke my hand."

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roadway, he would then get on the radio and tell me to cancel that pursuit, stop following that vehicle because it's not worth the risk."

Garcia denied that his car hit the median and denied that he was driving 65 miles per hour when he turned onto South Real Road. He said he stopped his car because the police officers "had guns drawn." He did not have a cut on his face when he stopped his car, and he received the cut when an officer "put his knee in the back of my head and busted my cheek and then he broke my hand."

His attorney asked why he was testifying, and Garcia responded:

> "Because I don't think that it's right. [¶] … [¶] And I just want them to hear my side of the story, because I've never been to trial or ever testified or anything, but him [referring to Esparza] saying—I've been in trouble before and I've been to jail, and you know what I'm saying, so going to jail is nothing new for me, but I'm not gonna get beat up for nothing and told that I did something and I didn't do it."

Garcia testified that after he was arrested, the officers took him behind a Kentucky Fried Chicken and wrote their report. They told him to "give them some guns or give them something and they'll let me go at my arraignment." Garcia understood this to mean they wanted him to snitch on someone, and he told them he had nothing for them. The officers took him to another location and pointed a Taser at him. The officers again asked for information on other criminal activity and said "they were friends with the D.A. and they could make it go away at my arraignment." Next, the officers took Garcia to his house to search it.[4] It was around 2:30 a.m. when they knocked on the door of his house and banged on windows, but they were unable to get in the house. Garcia testified that, from his house, the officers drove back to East Brundage and "then they drove all the way back down the freeway again, with me in the car, and I don't know what they were doing. And then they finally took me downtown."

Garcia admitted that he was convicted of commercial burglary in 2001, "convicted of stolen property" in 2005, and convicted of a gun charge in 2011. He said he did not go

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[4] After Garcia was arrested, Esparza and Aguilera learned that he was on probation, and the terms of his probation allowed the search of his residence for weapons and narcotics.

to trial in any of those cases because he was guilty, but he was "fighting against this case" because he was not guilty. He further testified that he would never run from the police for driving with a suspended license because driving with a suspended license is "a misdemeanor, a year county at best."

In cross-examination, Garcia admitted that he provided false identification to a peace officer in Tulare County in 2007. He said he did not see the police car behind him on the freeway until he "was already almost to the end of the run," and at that point he slowed down, turned right, and saw "a bunch of cops out there with their guns out telling me to get out of the car."

Rebuttal

Aguilera testified that he and Esparza tried to initiate a traffic stop "halfway through the on-ramp on the 58 westbound" by turning on their lights and siren, but the car did not pull over and instead accelerated.

After Garcia was arrested, Aguilera advised him of his *Miranda*[5] rights and asked whether he was aware that a police vehicle was following him. Garcia said he was aware and he assumed there was warrant for his arrest and he did not want to go to jail. Garcia also said that if his brakes had been in good condition, they would not have caught him. He asked how long he would be incarcerated. Aguilera responded that he was not sure, and Garcia opined that he would probably do about two months and his probation would be extended.

Aguilera and Esparza "parked somewhere as [they] waited for additional units" to assist in the house search, and then went to Garcia's house.[6] Aguilera did not recall Garcia having any injury on his face when he was arrested.

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5 *Miranda v. Arizona* (1966) 384 U.S. 436.

6 The officers intended to "conduct a probation compliance check." A sergeant directed them to knock on the door, but not to pursue it further if no one answered. Esparza testified, "We knocked, we received no answer, and we left."

Esparza testified that he never carried a Taser and demonstrated that there was no Taser on his duty belt. A deputy sheriff who worked in the downtown jail reviewed the jail's records for Garcia and testified there was no record of Garcia complaining of any pain in his hand while he was in jail. The record showed that during booking, Garcia answered yes to "minor cuts, boils, or abrasions" but did not indicate he had any pain or swelling in the hands or feet.

Instructions, verdict, and sentence

The trial court instructed the jury, among other things, "if you find that a witness has been convicted of a felony" or "committed a crime or other misconduct, you may consider that fact *only* in evaluating the credibility of the witness'[s] testimony." (Italics added.) Conviction of a felony or commission of a crime or other misconduct "does not necessarily destroy or impair a witness'[s] credibility. It is up to you to decide the weight of that fact and whether that fact makes the witness less believable." The jury was further instructed: "During the trial, certain evidence was admitted for a limited purpose. You may consider that evidence only for that purpose and for no other."

The jury found Garcia guilty of both counts. In a bifurcated trial, the court found true the allegations regarding two prior prison terms. Probation was denied, and the trial court imposed a term of five years for count 1, consisting of the upper term of three years, plus two one-year enhancements under section 667.5, subdivision (b). The court imposed a term of 180 days for count 2, to be served concurrently.

DISCUSSION

I. Admission of prior felony convictions and misdemeanor conduct to impeach

Garcia contends the trial court abused its discretion and violated his right to due process by allowing his testimony to be impeached by three unsanitized felony convictions and by prior misdemeanor conduct that showed motive and propensity. This contention is without merit.

A. Felony convictions

Subject to the trial court's discretion under Evidence Code section 352, a witness's prior felony convictions for crimes involving moral turpitude are admissible to impeach. (Evid. Code, § 788; *People v. Green* (1995) 34 Cal.App.4th 165, 182 (*Green*).)

We review for abuse of discretion a trial court's decision whether to admit prior felony convictions for impeachment purposes. (*Green*, *supra*, 34 Cal.App.4th at pp. 182–183.) "'A trial court's exercise of discretion will not be disturbed unless it appears that the resulting injury is sufficiently grave to manifest a miscarriage of justice. [Citation.] In other words, discretion is abused only if the court exceeds the bounds of reason, all of the circumstances being considered. [Citation.]' [Citation.]" (*Ibid*.)

Here, Garcia concedes that his conviction for possession of a firearm in 2011 was a crime involving moral turpitude. (See *People v. Williams* (2009) 170 Cal.App.4th 587, 608 [possession of firearm by a felon involves moral turpitude].) In addition, his conviction for burglary in 2001 necessarily involved moral turpitude (see *People v. Hunt* (1985) 169 Cal.App.3d 668, 675), and receipt of a stolen vehicle (his 2005 felony conviction) is a type of receipt of stolen property that also has been found to involve moral turpitude (see *People v. Gray* (2007) 158 Cal.App.4th 635, 641). Accordingly, these convictions had "some 'tendency in reason' [citation] to shake one's confidence in his honesty" and were admissible to impeach Garcia's testimony, subject to the court's discretion. (*People v. Castro* (1985) 38 Cal.3d 301, 315, 317 (*Castro*).)

Garcia claims the trial court abused its discretion under the "*Beagle* guidelines" and Evidence Code section 352. (*People v. Beagle* (1972) 6 Cal.3d 441, 453 (*Beagle*), superseded on other grounds by Cal. Const., art. I., § 28, subd. (f) and abrogated on other grounds by *People v. Diaz* (2015) 60 Cal.4th 1176, 1190.) Although not intended to establish rigid standards, our Supreme Court in *Beagle* identified "certain suggested factors to be considered in the exercise of discretion—namely, (1) whether the prior conviction reflects on honesty and integrity; (2) whether it is near or remote in time;

(3) whether it was suffered for the same or substantially similar conduct for which the witness-accused is on trial; and, (4) finally, what effect admission would have on the defendant's decision to testify." (*Castro, supra*, 38 Cal.3d at p. 307.)

Garcia argues the convictions for burglary and possession of a stolen vehicle were relatively remote in time. "However, convictions remote in time are not automatically inadmissible for impeachment purposes. Even a fairly remote prior conviction is admissible if the defendant has not led a legally blameless life since the time of the remote prior. [Citations.]" (*People v. Mendoza* (2000) 78 Cal.App.4th 918, 925–926 (*Mendoza*).) In *Mendoza*, the trial court allowed for impeachment purposes, evidence of 10 prior felony convictions, including convictions that occurred 16, six, four, and two years before the charged offenses. (*Id.* at pp. 922–923.) The Court of Appeal concluded that the strong probative value of *all* of the priors outweighed their prejudicial effect. (*Id.* at pp. 927–928.) In reaching its conclusion, the court observed, "[I]mpeachment of [the] defendant with only one or two priors would have given him a 'false aura of veracity' because it would suggest that [the] defendant has led a generally legally blameless life, whereas he had not been able to remain crime-free for any significant period of time between 1979 and 1999." (*Id.* at p. 927.) Further, our high court has often recognized that "a series of crimes may be more probative of credibility than a single crime." (*People v. Clark* (2011) 52 Cal.4th 856, 932–933 (*Clark*) [citing cases].)

In this case, the trial court allowed evidence of three felony convictions to impeach Garcia. The court explained there were convictions from 2011, 2005, and 2001, "[a]nd usually all three could come in because they show a period of aberrant behavior over a period of time" and a witness "[c]an't testify with a halo if it's not justified." The court's reasoning comports with *Mendoza* and *Clark* and was not an abuse of discretion.

Garcia next argues the firearm conviction did not reflect directly on his honesty. But *any* prior felony conviction involving moral turpitude is prima facie admissible for impeachment purposes at the trial court's discretion. (*People v. Littrel* (1986) 185

Cal.App.3d 699, 702.) This is because there is some basis for inferring that a person who has committed a crime involving moral turpitude is more likely to be dishonest than a witness about whom no such thing is known, even if dishonesty is not an element of the crime. (*People v. Wheeler* (1992) 4 Cal.4th 284, 295 (*Wheeler*), citing *Castro*, *supra*, 38 Cal.3d at p. 315.) Because Garcia's conviction for possession of a firearm by a felon involved moral turpitude (and he does not dispute this), it was relevant to his credibility and prima facie admissible. Given that a series of crimes may be more probative of credibility than a single crime, we see no abuse of discretion in the trial court allowing evidence of Garcia's most recent felony conviction to impeach even if the crime did not directly involve dishonesty. (See *Clark*, *supra*, 52 Cal.4th at p. 932.)

Garcia also claims the trial court abused its discretion by "summarily" denying his motion in limine "without performing the required analysis, which would have resulted in exclusion of all but one, or at least sanitation of all, of the prior convictions." We disagree. Contrary to Garcia's claim, the trial court expressly considered the *Beagle* guidelines in making its ruling. The court observed that Garcia's prior felony convictions involved "crimes of moral turpitude" (and, thus, were relevant to credibility), were "not remote in time," and were "dissimilar from what are charged in our case." In addition, "when ruling on [an Evidence Code] section 352 motion, a trial court need not expressly weigh prejudice against probative value, or even expressly state it has done so. All that is required is that the record demonstrate the trial court understood and fulfilled its responsibilities under Evidence Code section 352." (*People v. Williams* (1997) 16 Cal.4th 153, 213.) Here, Garcia moved to bar the use of any prior felony convictions to impeach, citing Evidence Code section 352. The trial court then explained its rationale for allowing all three felony convictions for impeachment purposes. This was sufficient and, as discussed above, the court's ruling was not an abuse of discretion.

In summary, the trial court did not abuse its discretion by allowing evidence of Garcia's three prior felony convictions to impeach his testimony. Moreover, even if we

assume there was some abuse of discretion, we see no prejudice. The jury was instructed that evidence of a witness's other crimes or misconduct could *only* be used to evaluate the credibility of that witness. "We presume the jury followed this instruction." (*People v. Doolin* (2009) 45 Cal.4th 390, 443.) The jury learned from Esparza that Garcia was on probation and learned from Aguilera that Garcia assumed there was a warrant for his arrest at the time he was arrested. Garcia himself testified that he had been to jail before and "going to jail is nothing new for me" and explained that he would never run from the police because driving with a suspended license would only mean a year in county jail at most. Thus, the jury would have known that Garcia had some criminal history even without the admission of the felony convictions for impeachment purposes. We further observe that the felony conviction offenses of commercial burglary, receipt of stolen property, and a gun charge, in addition to being dissimilar to the current charges, are not violent or particularly inflammatory. Finally, Garcia's testimony—that he never realized he was being pursued on the freeway by a following police patrol car that had its siren and lights on and was traveling at 100 miles per hour—is inherently somewhat implausible. Under these circumstances, it is not reasonably probable that the outcome would have been more favorable to Garcia had the felony convictions not been admitted to impeach. (See *People v. Watson* (1956) 46 Cal.2d 818, 836 (*Watson*); *People v. Mullens* (2004) 119 Cal.App.4th 648, 658–659 [error in admission or exclusion of evidence reviewed under *Watson* harmless error test].)

B. Misdemeanor conduct

If a witness's past criminal conduct amounting to a misdemeanor has some logical bearing upon his or her veracity, the conduct is admissible, subject to the trial court's discretion under Evidence Code section 352. (*Wheeler, supra,* 4 Cal.4th at p. 295.) We review for abuse of discretion a trial court's decision whether to admit prior misdemeanor conduct for impeachment purposes. (See *People v. Chatman* (2006) 38 Cal.4th 344, 373–374.)

Pretrial, Garcia argued that the probative value of the misdemeanor conviction was extremely low and that it was improper character evidence. The trial court, however, found that Garcia's misdemeanor conduct of false representation of identity to a peace officer was relevant to his credibility, stating, "I think that does go more pointed towards credibility or lack thereof." We agree that this misdemeanor conduct, which involved dishonesty, was relevant to Garcia's credibility. (Cf. *People v. Steele* (2000) 83 Cal.App.4th 212, 222–223 [error not to allow the defendant to cross-examine witness regarding prior conduct of providing false information to a peace officer]; *Castro, supra*, 38 Cal.3d at p. 315 ["Obviously it is easier to infer that a witness is lying if the felony of which he has been convicted involves dishonesty as a necessary element …."].) During trial, the court also noted that it had done "further research" and stated: "The truth-in-evidence provisions of Proposition 8 have repealed the limitations on credibility evidence contained in Evidence Code Section 787 in criminal cases. Thus, a trial court has broad discretion to admit specific acts of dishonesty or moral turpitude to impeach a witness'[s] credibility. Past criminal conduct amounting to a misdemeanor, which has a logical bearing on the veracity of a witness, is admissible under this standard." The trial court clearly understood the law and its discretion in the matter. It was within the court's discretion to determine that the probative value of Garcia's misdemeanor conduct was *not* substantially outweighed by the danger of undue prejudice and, therefore, to allow cross-examination on his misdemeanor conduct to impeach.

Garcia claims the trial court abused its discretion "due to the extraordinary prejudice produced by the tendency of such prior misconduct to show motive and propensity to commit the instant crimes." We are not persuaded. Giving false identifying information to a peace officer does not show a propensity to engage in high-speed car chases with the police. Further, the possible undue prejudice must be weighed against the "pointed" relevance of the conduct in assessing Garcia's credibility. Again, we find no abuse of discretion.

Even if we assume error, we find no prejudice. In light of the evidence presented and instructions given, as discussed above, a result more favorable to Garcia would not have been reasonably probable had questions about Garcia's misdemeanor conduct not been allowed for impeachment purposes. (*Watson*, *supra*, 46 Cal.2d at p. 836.)

In conclusion, the trial court did not abuse its discretion by allowing impeachment of Garcia's testimony through evidence of his three prior felony convictions and his misdemeanor conduct and, even assuming, an error, there was no prejudice. For these reasons, we also reject Garcia's due process claim. "'As a general matter, the ordinary rules of evidence do not impermissibly infringe on the accused's right to present a defense.' [Citation.]" (*People v. Hawthorne* (1992) 4 Cal.4th 43, 58.) We do not discern any fundamental unfairness or denial of due process in the application of evidentiary rules in this case. (See *ibid*.)

II. Prosecutorial misconduct

Garcia further contends the prosecutor engaged in prejudicial misconduct and his attorney provided ineffective assistance by failing to object. Garcia has failed to demonstrate reversible error.

A. Background

During cross-examination of Garcia, the prosecutor asked why he gave a false name to a peace officer in 2007. Garcia responded that he did not know. The prosecutor asked, "Did you do it because you had a warrant for your arrest at that time and you didn't want that officer to arrest you for that warrant and you thought if you gave him a different name … he wouldn't arrest you?" Garcia's attorney did not object to the question. Garcia replied, "No. He was going to arrest me anyways." The prosecutor again asked why he did it, and Garcia again responded that he did not know.

The prosecutor noted that Garcia testified that he wouldn't run from the police for a suspended license because "that's a misdemeanor, a couple months in jail, and that's not worth it to you [addressing Garcia] to run from the police for that situation." This

raised the question, which the prosecutor asked, "[W]hat situation would you be in that would cause you to run from the police?"[7] Garcia responded, "I wasn't in no position to run. I didn't run." He then said there was no reason he would run from the police.

In his closing statement, the prosecutor reminded the jury of the impeachment evidence. "You heard some evidence about him being convicted of different felonies, of him giving false information to a police officer, giving the wrong name. You can consider those things when deciding whether to believe him or not …." He told the jury it could use its common sense and argued that Garcia's version of what happened was not plausible and was not supported by evidence.

In his closing, Garcia's attorney argued that Garcia's testimony was "completely reasonable" and it was the officers' version of events that was not supported by evidence, noting the absence of evidence such as photographs of Garcia's allegedly crashed and disabled car or testimony from other drivers on the freeway who may have witnessed the chase. He asserted that Garcia "*had no reason to evade these officers* for miles at a hundred miles per hour." (Italics added.) "[Garcia] told you [the jury] he knew his license was suspended. He was honest about that. He wasn't worried about that. He would never run from officers because of that. He wasn't under the influence.… The car wasn't stolen, nothing like that. He had no reason to do what these officers are saying that he did …."

In rebuttal, the prosecutor responded to Garcia's argument that he had no reason to evade the police. After explaining that the People were not required to prove motive, he suggested possible motives for Garcia's actions. First, even though Garcia said he wouldn't evade the police because of his suspended license, it was possible he did not

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[7] At this point, Garcia's attorney objected on the grounds of irrelevance and speculation, and the objection was overruled.

want to get caught for that and he thought he could get away. Another motive was that he thought he had an arrest warrant. The prosecutor continued:

> "And that's one of the reasons I asked him about why would he provide a false name to a police officer. Why would he tell him the wrong name, *unless he thought he had a warrant that time too*, unless he thought that there was a warrant for his arrest and by telling the officer a different name … [he] would go free.… [H]e didn't explain it to you why he would do that, but it makes sense based on the evidence. *It makes sense that he thought he had a warrant and he didn't want to go back to jail*, even though, according to him, he only thought he was going to do a couple months. No big deal to him.
>
> "That's why he ran. That's motive …. He thought he could get away. And so that's why he did it." (Italics added.)

Garcia's attorney did not object to the prosecutor's argument.

B. Analysis

Garcia contends the prosecutor committed misconduct when he argued to the jury that Garcia "had a motive, and by implication a propensity, to commit crimes to avoid arrest when confronted by police authority."

A prosecutor commits misconduct if he or she uses deceptive or reprehensible methods to attempt to persuade the jury. (*People v. Earp* (1999) 20 Cal.4th 826, 858.) "'To preserve for appeal a claim of prosecutorial misconduct, the defense must make a timely objection at trial and request an admonition; otherwise, the point is reviewable only if an admonition would not have cured the harm caused by the misconduct.' [Citations.]" (*Ibid.*)

Garcia concedes that his attorney did not object to the prosecutor's argument at the time it was made, but he claims an objection would have been futile. We disagree. When the prosecutor suggested that Garcia gave a police officer the wrong name in 2007 because he thought he had a warrant at that time, his attorney could have objected to the argument as referring to facts (Garcia's belief at the time or the existence of a warrant)

not in evidence.[8] The trial court could have admonished the jury, the prosecutor then would have ended that line of argument, and any potential harm would have been averted. Thus, Garcia forfeited his claim of prosecutorial misconduct by failing to raise a timely objection and request an admonition.

In addition, we discern no prejudicial misconduct. Evidence Code section 1101, subdivision (a), prohibits the use of evidence of specific instances of a person's conduct to prove his or her conduct on a specified occasion. Evidence used in such as manner is referred to as improper propensity or character evidence. (E.g., *People v. DeHoyos* (2013) 57 Cal.4th 79, 142.) However, Evidence Code section 1101 does not prohibit the admission of evidence of a person's prior conduct to prove a fact such as motive, intent, or absence of mistake. (*Id.*, subd. (b).)

Here, the prosecutor attempted to use Garcia's prior misdemeanor conduct to discredit Garcia's testimony that he had no reason to evade the police and to bolster the People's theory that Garcia had reason to run from the police because he believed there was a warrant for his arrest. This was, at least arguably, a permissible use of Garcia's prior conduct to show motive.[9] Garcia appears to agree that the prosecutor's purpose was

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[8] Garcia asserts that any objection would have been futile after the trial court ruled that questioning regarding his misdemeanor conduct would be admissible to impeach. However, Garcia's attorney still could have objected when the prosecutor went beyond the facts of his misdemeanor conduct and asked, "Why did you give him the wrong name?" After Garcia responded that he did not know, the prosecutor asked, "Did you do it because you had a warrant for your arrest at that time and you didn't want that officer to arrest you for that warrant and you thought if you gave him a different name … he wouldn't arrest you?" At that point, Garcia's attorney could have objected to the question as argumentative, compound, improperly suggesting facts not in evidence, and having been asked and answered. But Garcia's attorney did not object.

[9] In his reply, Garcia argues that using the misdemeanor conduct to show motive "would have required a prosecution motion pursuant to Evidence Code section 1101, subdivision (b)" and constituted a violation of the trial court's in limine order. We do not consider arguments raised for the first time in a reply brief. (See *People v. Tully* (2012) 54 Cal.4th 952, 1075.) We also note that Garcia's argument appears to be without merit. The trial court ruled that Garcia's misdemeanor conduct was admissible to impeach, and Evidence Code section 1101, subdivision (a), would bar the prosecutor from using that conduct to show Garcia had a propensity to evade the police. But Garcia cites no authority for the proposition that the

to show motive, but asserts that the prosecutor's argument amounted to egregious misconduct because "a reasonable inference from [the prosecutor's] theory was that [Garcia] had a propensity to commit crimes in order to get away from the police and hence must be guilty of the charged felony." But Garcia's own assertion shows that the prosecutor did not expressly make an improper argument that Garcia had a propensity to run from the police. Rather, Garcia claims the prosecutor's argument permitted "a reasonable inference" of propensity to commit crimes. We discern no egregious misconduct in the prosecutor's argument. While it was perhaps a stretch for the prosecutor to suggest that Garcia thought there was a warrant for his arrest in 2007 when he gave the police a false name, it does not appear that the prosecutor used "'"'"'deceptive or reprehensible methods to attempt to persuade the jury.'"'"' (*People v. Earp*, *supra*, 20 Cal.4th at p. 858.) The prosecutor's argument that Garcia had a motive to evade the police because he thought there was a warrant for his arrest and he wanted to avoid jail was properly based on the evidence; Aguilera testified that Garcia told him after his arrest that he assumed there was a warrant for his arrest and he did not want to go jail.

Further, even if we ignore Garcia's forfeiture of the claim and assume the prosecutor's argument was improper, we find no prejudice. The Attorney General points out that the prosecutor's closing statement "focused almost entirely on the issue of [Garcia's] credibility." We would add that the prosecutor particularly focused on the implausibility of Garcia's testimony that he did not notice that he was being pursued by a patrol car that had its siren blaring and lights flashing. Considering the prosecutor's entire argument in light of the evidence presented, it is not reasonably probable Garcia would have obtained a more favorable outcome had the prosecutor argued that Garcia

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prosecutor needed to seek a ruling from the court before it could use the misdemeanor conduct to show motive.

had a motive to evade the police but omitted reference to Garcia's misdemeanor conduct from 2007. (*Watson, supra*, 46 Cal.2d at p. 836.)

Finally, because his claim of prejudicial prosecutorial misconduct fails, Garcia's claim of ineffective assistance of counsel based on failure to object to the alleged misconduct must also fail because he cannot establish prejudice. (See, e.g., *People v. Coffman and Marlow* (2004) 34 Cal.4th 1, 119, 120; *People v. Farnam* (2002) 28 Cal.4th 107, 201; *People v. Ochoa* (1998) 19 Cal.4th 353, 414.)

DISPOSITION

The judgment is affirmed.

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KANE, Acting P.J.

WE CONCUR:

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POOCHIGIAN, J.

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FRANSON, J.